(1)

Supreme Court, U.S.
FILED

98 1780 MAY 5 - 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

PHILLIP A. SORROW,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

RAFE BANKS III
Counsel of Record

BANKS, STUBBS & NEVILLE
Suite 200
110 Old Buford Road
Cumming, Georgia 30130
(770) 887-1209

May 4, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 pp

QUESTION PRESENTED

The State of Georgia by statute (O.C.G.A. § 24-3-1(b)) provides for the admission of hearsay in cases of "necessity". The question presented is:

Under the facts of this case was Petitioner denied the rights of confrontation and cross-examination granted to him pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDING

Phillip A. Sorrow (*Petitioner* in this Court)

State of Georgia (*Respondent* in this Court)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Background 2

B. The Proceedings 3

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Adams v. State, 217 Ga. App. 706 (459 S.E.2d 182) (1995) 7

Barber v. Page, 390 U.S. 719 (1968) 9

Becton v. State, 134 Ga. App. 100 (213 S.E.2d 195) (1981) 8

Brookhart v. Janis, 384 U.S. 1 (86 S. Ct. 1245, 16 L. Ed. 2d 314) (1966) 9

California v. Green, 399 U.S. 149 (90 S. Ct. 1930, 26 L. Ed. 2d 489) (1970) 9

Douglas v. Alabama, 380 U.S. 415 (85 S. Ct. 1074, 13 L. Ed. 2d 934) (1965) 9

Dutton v. Evans, 400 U.S. 74 (91 S. Ct. 210, 27 L. Ed. 2d 213) (1970) 8, 9

Illinois v. Allen, 397 U.S. 337 (90 S. Ct. 1057, 25 L. Ed. 2d 353) (1970) 9

Lingerfelt v. State, 235 Ga. 139 (218 S.E.2d 752) (1975) 8

Pointer v. Texas, 380 U.S. 400 (85 S. Ct. 1065, 13 L. Ed. 2d 923) (1965) 8, 9

Roberts v. Russell, 392 U.S. 293 (88 S. Ct. 1921, 20 L. Ed. 2d 1100) (1968) 9

Sorrow v. State, 234 Ga. App. 357 (505 S.E.2d 842) (1998) 1

Thomas v. State, 199 Ga. App. 586 (405 S.E.2d 512) (1991) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

O.C.G.A. § 16-5-23.1 2

O.C.G.A. § 24-3-1(b) 1, 2, 6

O.C.G.A. § 24-9-23(a) 2

O.C.G.A. § 24-9-64 7

CONSTITUTIONAL AUTHORITY:

Georgia Constitution of 1983, Art. I, § I, Para. XIV 6

Georgia Constitution of 1983, Art. I, § I, Para.I. 4, 7

United States Constitution, Fifth, Sixth and Fourteenth Amendments 1, 4, 6, 8, 9

PETITION FOR WRIT OF CERTIORARI

Phillip A. Sorrow respectfully petitions for a Writ of Certiorari to review the Judgment of the Georgia Court of Appeals and as to which Certiorari was denied by the Supreme Court of Georgia, the Georgia Court of last resort. The Georgia Court of Appeals erroneously determined that Petitioner had not been denied his rights of confrontation and cross-examination under the United States Constitution when a hearsay statement was admitted into evidence pursuant to O.C.G.A. § 24-3-1(b).

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported as *Sorrow v. State*, 234 Ga. App. (505 S.E.2d 842) (1998) (Appendix A). The opinion of the Georgia Supreme Court denying Certiorari is reported as ___ Ga.___ (January 15, 1999) (Appendix B) and the decision of the Georgia Supreme Court denying rehearing of Petition for Writ of Certiorari is not reported (Appendix C).

JURISDICTION

Jurisdiction is based upon denial of rights protected by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The Georgia Court of Appeals issued its decision on August 31, 1998. The Georgia Supreme Court denied Petitioner's Petition for Writ of Certiorari on January 15, 1999. Petitioner properly submitted a Motion for Reconsideration to the Georgia

Supreme Court. This Petition is timely filed within ninety days of the Georgia Supreme Court's denial of Petitioner's Motion For Rehearing on February 8, 1999.

STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 24-3-1 provides:

(a) Hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons.

(b) Hearsay evidence is admitted only in specified cases from necessity.

STATEMENT OF THE CASE

A. Background

Petitioner, Phillip A. Sorrow, was convicted in the State Court of Forsyth County, Georgia of the misdemeanor offense of Battery[1] based upon the prior out of court statement of his wife which was admitted as "necessary" when she exercised her marital privilege to not testify pursuant to O.C.G.A. § 24-9-23(a) which provides that a spouse may not be compelled to testify for or against each other.

[1] O.C.G.A. § 16-5-23.1

B. The Proceedings

This appeal is from the State Court of Forsyth County following a verdict of Guilty in a jury trial. Petitioner was charged on accusation by the Solicitor General of Forsyth County in one count with the misdemeanor offense of Battery.

The case proceeded to jury trial on November 19-21, 1997. Petitioner was convicted on November 21, 1997 and on January 20, 1998 was sentenced to 12 months to serve provided that eleven months would be served on probation. Petitioner thereafter filed his Notice of Appeal to the Georgia Court of Appeals

Facts presented in the State's case and relevant to the question presented show the following: The "victim", Anne Sorrow, was the wife of Petitioner and exercised her marital privilege to not testify. The state then sought to introduce – as an exception to Georgia's hearsay rule – Mrs. Sorrow's statement as given to the investigating officer on the night of the alleged event.

The court conducted a hearing outside the presence of the jury and considered the necessity of admitting Mrs. Sorrow's statement as well as considering whether or not there were sufficient indicia of reliability to admit the statement.

During that hearing outside the presence of the jury, Mrs. Sorrow testified that the statement sought to be introduced by the State was inaccurate in some respects and incomplete in other aspects.

The investigating officer – through whom the state sought to introduce Mrs. Sorrow's statements – and through whom the state sought to establish the indicia of reliability also testified outside the presence of the jury concerning Mrs. Sorrow's statement. That officer (Wayne Seymour) initially testified on direct concerning his recollection of events. The investigating officer then testified on cross-examination and still outside the presence of the jury.

Ultimately, the investigating officer realized that he had been testifying about the wrong set of circumstances. The State then provided him with a copy of the "statement" by Mrs. Sorrow and a copy of an incident report and then recalled Mr. Seymour who then testified that his recollection of his investigation was a "whole lot" different now than it was when he testified earlier in the day.

Petitioner's objection to the admissibility of such statement was denied as the trial Court finally decided to admit the hearsay statement of the investigating officer. Petitioner excepted to the court's ruling contending that admission of the statement would violate the right to confrontation and cross-examination under both the Georgia Constitution (Article I, Section I, Paragraph I,) and under the Sixth Amendment to the United States Constitution and was violative of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

The court additionally overruled Petitioner's objection to the admission of a similar prior transaction.

Petitioner was thereafter convicted based solely upon the admitted hearsay statement and evidence of the similar transaction.

The Georgia Court of Appeals issued its decision on August 31, 1998. The Georgia Supreme Court denied Petitioner's Petition for Writ of Certiorari on January 15, 1999. Petitioner properly submitted a Motion for Reconsideration to the Georgia Supreme Court. This Petition is timely filed within ninety days of the Georgia Supreme Court's denial of Petitioner's Motion For Rehearing on February 8, 1999.

REASONS FOR GRANTING THE PETITION

This case presents an example of zealous prosecution of a "domestic violence" type criminal offense and addresses the interplay between spousal privilege and the application of the constitutional doctrines of confrontation and cross-examination in light of a state statutory exception to the general exclusion of hearsay.

The issues set forth herein are of broad importance in an era of heightened consciousness of "domestic violence" and increasing pressure upon prosecutors to vigorously prosecute such offenses. Specific guidance is necessary to preserve the balance between vigorous prosecution and the protection of individual constitutional rights.

A review of existing law and principles involved will illustrate the necessity of providing such guidance and protection.

Petitioner does not contend that O.C.G.A. § 24-3-1 is facially unconstitutional but that in the circumstances of this case its application resulted in denial of constitutional protections to Petitioner. O.C.G.A. § 24-3-1 provides:

> (a) Hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons.
>
> (b) Hearsay evidence is admitted only in specified cases from necessity.

The hearsay statement was admitted pursuant to this Georgia statutory rule of evidence. Petitioner contends that the constitutional requirements of the Georgia and United States Constitutions take precedence over a statutory rule of evidence. Article I, Section I, Paragraph XIV of the Georgia Constitution provides:

> Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel; shall be furnished with a copy of the accusation or indictment and, on demand, with a list of the witnesses on whose testimony such charge is founded; shall have compulsory process to obtain the testimony of that person's own witnesses; and shall be confronted with the witnesses testifying against such person.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

> which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Article I, Section I Paragraph I of the Georgia Constitution provides:

> No person shall be deprived of life, liberty, or property except by due process of law.

O.C.G.A. § 24-9-64 provides:

> The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him. If several parties to the same case have distinct interests, each may exercise this right.

The question squarely presented is whether a statutory rule of evidence (O.C.G.A. § 24-3-1(b)) will trump the constitutional provisions of the Georgia and Sixth Amendment to the United States Constitutions as set forth above and which protect the right of confrontation and cross-examination. Petitioner additionally contends he has suffered a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Since the primary evidence against Mr. Sorrow consisted of the hearsay statement and evidence of a similar transaction, Mr. Sorrow was convicted essentially as if an *ex parte* affidavit had been admitted against him. See, *Adams v. State*, 217 Ga. App. 706 wherein it was observed,

> **It is basic** that every person charged with an offense against the laws of this State **shall be**

> **confronted** with the witnesses testifying against him. It is also basic that upon the trial of a criminal case upon the issue of guilty or not guilty, *ex parte* affidavits are not admissible either for or against the accused. The basis of these rules is the fundamental principle that in a criminal prosecution the testimony of the witnesses shall be taken before the court, so that at the time they give the testimony they will be **sworn and will be subject to cross-examination, the scrutiny of the court, and confrontation by the accused**.

(Citation and punctuation omitted.) (**emphasis added**) *Becton v. State,* 134 Ga. App. 100, 101 (213 S.E.2d 195).

The Georgia Court of Appeals has also previously recognized, "The Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the states by the Fourteenth Amendment. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Lingerfelt v. State,* 235 Ga. 139, 140 (218 S.E.2d 752) (1975) (quoting from *Pointer v. Texas,* 380 U.S. 400, 403 (85 S. Ct. 1065,. 13 L. Ed. 2d 923) (1965)", *Thomas v. State,* 199 Ga. App. 586.

Petitioner contends that in the circumstances of this case there was a denial of confrontation and cross-examination when he was convicted entirely upon evidence as to which he had no opportunity of cross-examination or confrontation.

Seminal guidance can be gained from *Dutton v. Evans,* 400 U.S. 74, 88-89 (91 S. Ct. 210, 27 L. Ed. 2d 213) (1970) in which it was observed:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." Id., at 155-156 (citations and footnote omitted).

It cannot be reasonably argued that the evidence to which Petitioner objected was not "crucial" or "devastating" as it was the only evidence – other than that of a similar transaction. *Dutton* has made it clear that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right . . . made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403. See also *Douglas v. Alabama*, 380 U.S. 415; *Brookhart v. Janis*, 384 U.S. 1; *Barber v. Page*, 390 U.S. 719; *Roberts v. Russell*, 392 U.S. 293; *Illinois v. Allen*, 397 U.S. 337; *California v. Green*, 399 U.S. 149.

The admission of the hearsay statement against Petitioner resulted in a complete denial of confrontation and

cross-examination of the out of court declarant and was erroneous and must be reversed.

CONCLUSION

For the above and forgoing reasons the writ of certiorari should be granted.

Respectfully submitted,

RAFE BANKS III
Counsel of Record

BANKS, STUBBS & NEVILLE
Suite 200
110 Old Buford Road
Cumming, Georgia 30130
(770) 887-1209

May 4, 1999

APPENDIX A

FIRST DIVISION
McMURRAY, P.J.,
BLACKBURN and ELDRIDGE, JJ.

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

August 31, 1998

In the Court of Appeals of Georgia

A98A1803. SORROW v. THE STATE BL-085C

BLACKBURN, Judge.

After a jury trial, Phillip A. Sorrow appeals his conviction of battery. Sorrow contends that the trial court erred in admitting the victim's incriminating hearsay statement into evidence. Sorrow claims that, because the victim did not testify, the admission of her statement violated his right to confront the witnesses against him and violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. The trial court correctly determined that the victim's statement was admissible pursuant to the necessity exception to the hearsay rule, and we affirm Sorrow's conviction.

1. "In *Higgs v. State,* 256 Ga. 606 (351 S.E.2d 448) (1987), the Georgia Supreme Court, citing *Ohio v. Roberts,* 448 U.S. 56, 65 (100 S. Ct. 2531, 65 L. Ed. 2d 597) (1980), held that the United States Supreme Court had not interpreted 'confrontation' to signify the exclusion of every

hearsay exception, and had provided a method to resolve confrontation challenges based on the admission of hearsay testimony: First, the Sixth Amendment establishes a rule of necessity. In the usual case the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. The second aspect operates once a witness is shown to be unavailable. Only hearsay marked with such trustworthiness that there is no material departure from the reason of the general rule may be admitted." (Citations and punctuation omitted.) *Adams v. State,* 191 Ga. App. 16, 17 (2) (381 S.E.2d 69) (1989).

OCGA § 24-3-1 (b) provides that "hearsay evidence is admitted only in specified cases from necessity." There are several specific exceptions from the rule against the admission of hearsay. See OCGA § 24-3-1 et seq. The Georgia Supreme Court has found that the evidence code does not contain an exhaustive list of exceptions to the hearsay rule. See *Higgs,* supra at 607 (3). It has determined that "the two underlying reasons for any exception to the hearsay rule are a necessity for the exception and a circumstantial guaranty of the trustworthiness of the offered evidence – that is, there must be something present which the law considers a substitute for the oath of the declarant and his cross examination by the party against whom the hearsay is offered." (Punctuation and emphasis omitted.) Id. Based upon OCGA § 24-3-1(b), therefore, the Georgia Supreme Court has held that "[a]n exception will be allowed 'from necessity' where 'necessity' and 'particularized guarantees of trustworthiness' are established. *Mallory v. State,* 261 Ga. 625 (2) (409

S.E.2d 839) (1991)." *McKissick v. State*, 263 Ga. 188, 189 (3) (429 S.E.2d 655) (1993).

In the present case, the State's only witness to the battery was the victim, Sorrow's wife. At trial, she invoked the marital privilege, see OCGA § 24-9-23, and refused to testify. The State then sought to introduce the victim's verbal and written statements that were made to the arresting officer shortly after the incident. The trial court determined that the victim's statements were necessary and reliable and admitted them pursuant to OCGA § 24-3-1(b).

(a) The victim's statement was necessary, and she was unavailable to testify because of her refusal to testify against her husband. See *Higgs*, supra at 608 (4) (witness was unavailable due to her refusal to testify against her husband and her testimony was necessary as the only eyewitness to the crime). See also *Wallace v. State*, 216 Ga. App. 718, 719 (2) (455 S.E.2d 615) (1995) (same).

(b) In determining whether the hearsay statements are trustworthy, the courts consider, among other things: "(1) [whether] the witness's statement was given shortly after the event; (2) [whether] the witness's statement was given during the course of an official investigation; and (3) [whether] there was [any] testimony that the witness retracted the statement or controverted the statement." *Jackson v. State*, 202 Ga. App. 582, 586 (2) (414 S.E.2d 905) (1992). Courts have also considered whether the declarant consulted an attorney before making the statements, whether the declarant previously testified regarding the reason for her refusal to testify, and the extent to which

the declarant's statement is supported by other evidence. See *Higgs*, supra at 608 (5). See also *Adams*, supra at 18.

In the present case, the trial court determined that the victim's statements were trustworthy because: they were given shortly after the incident occurred; they were made as part of an official investigation by a police officer; they were not based upon a faulty recollection; the declarant had no apparent reason to lie; and the declarant had not disavowed her statements. Our review of the record indicates that the trial court's findings are based on the evidence and are not clearly erroneous; therefore, we affirm the trial court's admission of the victim's hearsay statements pursuant to OCGA § 24-3-1(b).

2. We need not address Sorrow's second enumeration of error as he failed to support it with any argument or citation of authority except to refer to his arguments in connection with his first enumeration. See Court of Appeals Rule 27(C)(2).

Judgment affirmed. McMurray, P. J., and Eldridge, J., concur.

APPENDIX B

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: January 15, 1999

Rafe Banks, III
BANKS & STUBBS
200 Forsyth Professional Building
110 Old Buford Road
Cumming GA 30040

Case No. S99C0065

PHILLIP A. SORROW v. THE STATE

COURT OF APPEALS CASE NO. A98A1803

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

APPENDIX C

SUPREME COURT OF GEORGIA

Case No. S99C0065 Atlanta, February 08, 1999

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

PHILLIP A. SORROW v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.